IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1478 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHIKHABHAI LALLUBHAI SONAVIA

Versus

NANDUBEN ALIAS REVABEN W/O LALLUBHAI CHHIBABHAI

Appearance:

1. Civil Revision Application No. 1478 of 2001

MR BP MUNSHI for Petitioner No. 1

MS NIRALI B MUNSHI for Petitioner No. 1

MR JT TRIVEDI for Respondent No. 1

..... for Respondents No. 2-3

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 25/01/2002

C.A.V. JUDGEMENT

1. At the request of the learned advocates, this

Civil Revision Application is heard finally.

2. The petitioner/original plaintiff has filed this revision under Sec. 115 of the Code of Civil Procedure against the rejection of application for amendment made on behalf of the petitioner/plaintiff under Order 6 Rule 17 of the C.P.C. below exh. 130 by the 2nd Jt.Civil Judge (S.D.), Surat in Special Civil Suit no. 15 of 1991. (The parties to the petition are hereinafter referred to as the plaintiff and the defendants).

3. It is the case of the plaintiff that he is the son of Lallubhai Chhibabhai who expired in the year 1976. The defendant no. 1 is his stepmother namely Revaben Nanduben. The plaintiff has filed Special Civil Suit no. 15 of 1991 in Civil Judge (S.D.)'s Court on or about 18.1.91 praying that the defendant no. 1 has only life interest in the suit properties and for permanent injunction to restrain the said defendant no. 1 from transferring or alienating the suit properties. The late father of the petitioner Lallubhai had left behind him a Will dated 8.10.75 whereby he declared that if the second wife i.e. defendant no. 1 Nanduben @ Revaben does not give birth to a male child, then this plaintiff who is the son of the first wife will become absolute and exclusive owner of the properties left behind the deceased and as the said Lallubhai died on 8.10.76 leaving behind him only the plaintiff as a male child, he has become exclusive owner of the properties subject to creation of life estate in favour of the defendant no. 1. It is the case of the plaintiff that the defendant no. 1 transferred one of the properties bearing Survey no. 387, Block No. 388 admeasuring 1 Acre 12 Gunthas in favour of the defendant no. 3 by Sale Deed dated 8.5.92. The plaintiff challenged the same by filing amendment application dated 25.4.97 to join defendant no. 3 as a party-defendant as per exh. 40 which was granted by order of the trial court dated 13.3.00.

4. It is the case of the plaintiff that in the schedule attached to the plaint, all the properties namely Survey No. 17, Survey No. 319, Survey No. 388 a house and Tabela (Stable) were mentioned but through oversight and by mistake, survey no. 387 block no. 388 admeasuring 1 Acre 12 Gunthas was not mentioned. There was also a bona fide mistake regarding description of village and Taluka because the village ought to have been mentioned as Abrama and Taluka as Kamrej but by mistake it has been described as village Kamrej and taluka as Choryashi. It is a bona fide mistake and error but there had been no discrepancy or difficulty in identification

of the suit properties.

5. According to the plaintiff, the defendants appeared and filed their written statements after long lapse of time on 30.6.98 and 15.9.99 as per exh. 55 & 66. The learned 3rd Jt. Civil Judge (S.D.), Surat by order dated 13.3.00 had been pleased to allow the applications exhs. 5 (notice of motion), exh. 40 (to join defendant no.3 as party) & 41 (to restrain the defendant no. 2 & 3) filed by the plaintiff. The said order was challenged by the defendants by filing Appeal From Order no. 326 of 2000 which was disposed of by this Court (Coram : J.R.Vora, J) by order dated 18.6.01. Being aggrieved by the said order, the defendant applied for review of the said order by filing Misc. Civil Application No. 1142 of 2001 in Appeal from order no. 326 of 2000 on 9.7.01. Pending the hearing of the said review petition, as per order of this Court (Coram : J.R.Vora, J) the parties were directed to proceed further with the recording of evidence and hearing of the suit and accordingly, the plaintiff himself was examined vide exh. 102, Somsingh was examined vide exh. 110 and on behalf of the defendant nos. 2 & 3, Defendant no. 2 Natwerbhai Parabhubhai Desai has been examined vide exh. 122.

6. It is the case of the plaintiff that the aforesaid property which had been omitted through oversight to be included in the schedule viz. Survey no. 387, Block No. 388 admeasuring 1 Acre 12 Gunthas and already been referred to and mentioned in the order dated 13.3.00 exh. 5 and the plaintiff had also challenged the sale proceedings in respect of the same subject matter of the suit but through oversight and bona fide mistake the said property remained to be included in the schedule and as such the plaintiff filed an application for amendment exh. 130 on 3.12.01. The said applications were duly replied on behalf of the defendants as per exh. 132 and 133 filed on 4.12.01. The learned trial Judge, however, by the impugned order dated 7.12.01 passed below exh. 130 in Special Civil Suit No. 15 of 1991 rejected the application which has given rise to this Civil Revision Application on the ground that the aforesaid order of the learned trial Judge is illegal, improper and unjust and against settled principles of law.

7. It is the say of the plaintiff that the amendment application is innocuous application filed under Order 6 Rule 17 of the Civil Procedure Code which does not change nature and character of the suit and which is otherwise not prejudicial to the defence is, as a matter of course,

required to be allowed by the trial court.

8. In support of his submissions, Mr.B.P.Munshi L.A. for the plaintiff has relied on a number of authorities :

1. Shanabhai Mangalbhai Patel and others V/s Bhagwandas Revabhai Patel reported in 1990(1) G.L.H. 403.
2. Prabhudas R Patel & Ors. V/s Heirs of Patel Motibhai B Dashrath Ambalal M Patel & Ors. reported in 1997(2) G.L.H.434.
3. Bai Mirat Wd/o Mohanlal & Anr. V/s Vyas Prahladji Mohanlal & Anr. reported in XXIV (1) G.L.R. 528.
4. General Co-operative Bank Ltd. V/s SRM Industries & Ors. reported in 1992(2) G.L.H. 459.
5. Bakunvarba Jakhubha Jadeja and others V/s Chandubha Gumansing Zala and others reported in AIR 1997 Gujarat 170.
6. Ragu Thilak D John V/s S.Rayappan and others reported in (2001) 2 S.C.C. 472.
7. B.K.Narayana Pillai V/s Parameswaran Pillai and another reported in (2000) 1 S.C.C. 712.
8. Gajanan Jaikishan Joshi V/s Prabhakar Mohanlal Kalwar reported in (1990) 1 S.C.C. 166.
9. Vineet Kumar V/s Mangal Sain Wadhera reported in AIR 1985 S.C. 817.
10. Suraj Prakash Bhasin V/s Smt.Raj Rani Bhasin and others reported in AIr 1981 S.C. 485.

The sum and substance of the aforesaid authorities is that once the amendment is necessary for resolving the dispute between the parties, ordinarily the amendment should not be refused. The Court is required to see whether the amendment is necessary for arriving at just and fair decision for resolving the disputes between the parties. The amendment may be refused if, by lapse of time, the remedy is barred. It may also be refused to cases where the court comes to the conclusion that the party is resorting to the device of amendment of pleading as abuse of law and not for the purpose of putting its case in proper perspective.

9. In case of Ragu Thilak (supra) the relief sought was barred by limitation. However, the Apex Court allowed the amendment of plaint including incorporation of relief of recovery of damages. In the said case, in para 5 the Apex court has relied on the case of B.K.Narayana Pillai (supra) and taken the extract of para 3 as under :

" The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to acvoid uncalled-for multiplicity of litigation."

10. In case of Bakunvarba Jadeja (supra) this court has held that the defendant pointing out the description of property on which he has put up construction. The plaintiff seeking amendment to delete wrong description of property and give correct description. No serious prejudice is caused to defence of defendant and therefore amendment cannot be rejected.

11. Against the aforesaid submissions Sri J.T.Trivedi, L.A. for the respondent submitted that the principle as laid down in the aforesaid authorities cannot be disputed, however, such amendment application is to be considered under the facts and circumstances of each case and no general rule can be framed. He relied on the case of P.A.Ahammed Ibrahim V/s Food Corporation of India reported in AIR 1999 S.C. 3033 and submitted that amendment in facts would introduce totally new cause of action and change the nature of suit. It will also introduce a totally different case which is inconsistent with prayer made in application for referring dispute to arbitrator. The said action is likely to cause prejudice to appellant as it was sought 11 years after cause of action arose. The amendment cannot be allowed and sec. 151 C.P.C. could not be applied to such cases.

12. Shri J.T.Trivedi L.A. for the respondent also relied on the case of Manoj Beharilal Mathur and another V/s Dr.Shanti Mathur and others reported in AIR 1997 S.C. 2153 wherein it appears that the suit was filed for

perpetual injunction but later on separate suit for declaration that respondent was benamidar and property belong to joint property was filed. Application was filed for trial of issue as preliminary issue. Thereafter, application for amendment of plaint that respondent was trustee of property on behalf of joint family was given. Legal effect of benami transaction and respondent being trustee of property be pressed even without resorting to express amendment of plaint. Accordingly, held that amendment is not necessary.

13. Mr.Trivedi L.A. for the defendants further submitted that the xerox copy of Will of the deceased Lallubhai Chhibabhai Sonavia is produced before this court which is dated 8.10.75 and being registration no. 50 (Sr.no.2535) before the Sub-registrar, Kamrej, District : Surat. In the said Will on 4th page, there is reference of only survey no. 319, 388 and 17 and there is no reference of survey no. 387. It is not in dispute that said Lallubhai died on 8.10.76 and thereafter the present Special Civil Suit no. 15/91 was filed against the respondents-defendants in 1991.

14. If we peruse the case of Bakunvarba Jakhuba Jadeja (supra) on page 175 in para 13, the three Judge Bench of the Apex Court has discussed the case of M/s Modi Spinning & Weaving Mills Co.Ltd. V/s M/s Ladha Ram & Co. reported in AIR 1977 SC 680 wherein para 10 it is held as under :

" It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 & 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed, the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admision from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court."

The plaintiff would have known about the ownership of survey no. 387 and should have joined the said survey no. in the suit itself and also pray for some order below exh. 5. According to L.A.Mr.Trivedi for the respondents, the plaintiff took out one amendment application at exh. 40 whereby it is stated that while pending the suit, the present defendant no. 2 got one part of the land sold through defendant no. 1 to

Kusumben-wife of defendant no. 2 and also prayed for joining Kusumben as party-defendant. The plaintiff also prayed for injunction against defendant no. 3 by giving application at exh. 41. Both the applications at exh. 40 & 41 were allowed by order dated 13.3.00 by the trial court, however, at that time also the plaintiff never stated that land bearing survey no. 387 had been left out to be mentioned in the suit. Relying on the deposition of the present plaintiff, Mr.Trivedi submitted that in his deposition also, the present plaintiff has admitted in confirmation that there is no mention whatsoever of land bearing survey no. 387 in the said Will of his father. Under the circumstances, runs the submission of Sri Trivedi L.A. for the respondent that though this court in clear terms has stated that amendment can be allowed at any stage, the court is bound to look at the time gap as well as necessity for amending the plaint. He has also submitted that in A.O. 326/00 , this Court (Coram : J.R.Vora, J) while passing order on 18.6.01 has directed the trial court to finally hear and decide S.C.S. no. 15/91 within 3 months from the date of receipt of writ of this Court. With this direction, the appeal was disposed of. Now, that 3 months have already passed and over and above more than 3 to 4 months have passed, still the matter is not over and when the matter is at the fag end i.e at the stage of argument the plaintiff has come out with a new fact stating that land bearing survey no. 387 is left out by mistake and also instead of village Abrama and Taluka: Kamrej, village Kamrej and Taluka Charyoshi is mentioned. Sri Trivedi submitted that the said amendment cannot be allowed at the fag end of the suit and if this amendment is allowed at this stage, the plaintiff will have to go for fresh facts of the suit and there will be no end to the suit and therefore this C.R.A. required to be dismissed with costs.

15. I have gone through the authorities cited by the learned advocates and also perused the papers submitted before me such as copy of Will, application exh. 40 & 41, the deposition of the present plaintiff, copy of order passed by this court in A.O. no. 326/00 dated 18.6.01 and copy of plaint. I fully agree with the submissions of Sri Trivedi L.A. for the respondent that if such amendment is allowed at this stage, the plaintiff will be encouraged and also will encourage the bad intention of such litigants of making such applications at a belated stage. If we peruse the order passed below notice of motion, in para 4 the trial court has observed as under : "Moreover, as per case of the plaintiff, survey no. 387 was not given by the plaintiff's father

to him since the survey no. 388 was given to him by way of Will. So, survey no. 387 land is not a disputed property." Regarding the facts which were known to the plaintiff as back as on the day of death of his father i.e. 8.10.76, the plaintiff came out with the amendment application exh. 130 for the first time on 3.12.01. I have perused the order of the learned trial judge dated 7.12.01 and do not find any reason to interfere with the same as there is no jurisdictional error or any other defect which will attract the provision of Sec. 115 of the C.P.C. Therefore, this C.R.A. deserves to be dismissed with costs quantified at Rs.1,500/-.

16. Accordingly, this C.R.A. is dismissed with costs of Rs.500/- to be paid by the plaintiff to each of the respondents. The order passed by me on 11.1.02 ordering the Civil Judge (S.D.) Surat not to proceed with the Special Civil Suit no. 15/91 pending before him is vacated.

(SHARAD D DAVE, J)

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After pronouncement of this judgment, Mr.B.P.Munshi L.A. for the petitioner submits that this order may be stayed for 4 weeks as he wants to approach the higher forum. He also requested to order the trial court not to proceed with the S.C.S.No. 15/91 till that date. Therefore, this order is stayed till 25.2.02. The trial court is ordered not to proceed with S.C.S. no. 15/91 till 25.2.02.

25/1/02 (SHARAD D DAVE, J)